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NO. 89-960

In the Supreme Court of the United States

OCTOBER TERM, 1989

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners

v.

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KEVIN R. TULLY
Of
CHRISTOVICH & KEARNEY
Pan American Life Center, Suite 2300
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 561-5700

ATTORNEYS FOR PETITIONERS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

60 pp

QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit err in dismissing the Petitioners' appeal by relying on a procedure unauthorized by the Administrative Agency's regulations, the effect of which denies the Petitioners their right to have the substantive issues, including the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, heard by an Article III Court, and err by refusing to defer to the Benefits Review Board's own reasonable construction of its regulations.

LIST OF ALL PARTIES

TIDELAND WELDING SERVICE

LIBERTY MUTUAL INSURANCE COMPANY

WALTER SAWYER

GLENN RHODES

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

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33 U.S.C. §901, et seq.

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PETITION FOR A WRIT OF CERTIORARI

Tideland Welding Service and Liberty Mutual Insurance Company, Petitioners,

hereby petition this Court to issue a Writ of Certiorari to review the decision of the United States Fifth Circuit Court of Appeals entered on August 24, 1989, rehearing denied September 18, 1989, in the proceeding entitled "Tideland Welding Service and Liberty Mutual Insurance Company versus Walter Sawyer, Glynn Rhodes and Director, Office of Workers Compensation Programs, United States Department of Labor," No. 88-4280 of the docket of said Court, and reported at 881 F.2d 157.

OPINIONS BELOW

The Benefits Review Board's Order of April 22, 1987, is reprinted as Appendix A. The decision entered by the Fifth Circuit, reported at 881 F.2d 157, is reproduced as Appendix B; the order denying rehearing or rehearing en banc is

reproduced as Appendix C.

JURISDICTIONAL GROUNDS

Jurisdiction in the United States Fifth Circuit was pursuant to the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §921, a final order having been entered by the Benefits Review Board. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The decision sought to be reviewed, 881 F.2d 157, was rendered August 24, 1989; the order denying rehearing or rehearing en banc was filed on September 18, 1989. See 28 U.S.C. §2101(c); Rule of the Supreme Court of the United States 20.4.

STATUTORY PROVISIONS INVOLVED

20 C.F.R. §802.205A is the statutory regulation pertinent here. The relevant portions of 20 C.F.R. §802.205A, as written during the applicable time, reads:

(a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the filing of the time for filing a notice of appeal.

(b) (1) In a case involving a claim filed under the Longshoremen's and Harbor Worker's Compensation Act or its extensions (see §802.101(b)(1) - (5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than ten days from the date the decision or order was filed in the office of the deputy commissioner.

. . . .

(c) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in

§802.205.

(d) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in §802.205.

(e) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature. Following final action by the administrative law judge or deputy commissioner pursuant to either paragraph (c) or (d) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

STATEMENT OF THE CASE, COURSE OF PROCEEDINGS, AND STATEMENT OF FACTS

This Petition follows a lengthy and complicated trip through the procedures of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. A brief recitation of the facts follow.

Tideland Welding Service employed Walter Sawyer and Glenn Rhodes as welders in 1980. Liberty Mutual insured Tideland for both state workers compensation and the Longshoremen's and Harbor Workers' Compensation Act. On June 21, 1980, Sawyer and Rhodes were temporarily assigned to weld at the McDermott Shipyard facility in Morgan City, Louisiana. Due to rain, they were given permission to leave for the day. Sawyer and Rhodes left

the McDermott yard in a car owned and driven by Rhodes and were on U.S. Highway 90, the main road between Morgan City and New Orleans. Approximately one and a half miles from where they worked they were involved in a head-on collision, resulting in their injuries.

Sawyer and Rhodes sought compensation benefits under the LHWCA. Benefits were paid, although Tideland and Liberty Mutual disputed that the accident satisfied the situs test of the Act.

The claim was presented to Deputy Commissioner Glenn H. Woodley and on June 5, 1981, the Deputy Commissioner found that the claimants failed to satisfy the situs requirement of the Act. Thereafter a full hearing was held before Administrative Law Judge Ben H. Walley. Judge Walley rendered a written opinion

also, finding that the situs requirement of the Act was not satisfied. The Judge found no nexus between McDermott's waterfront activities and Highway 90. Also, after hearing live testimony, Judge Walley found the "trip payment exception" inapplicable. Based on Judge Walley's Decision and Order, Tideland and Liberty Mutual ceased paying benefits.

The claimants appealed the Administrative Law Judge's Decision and Order to the Benefits Review Board. The matter was argued to the Board on November 10, 1983, and on May 9, 1984, the Board reversed Judge Walley's decision, substituting its own factual determination to find situs and employment status. The Board remanded the case to Judge Walley to determine disability.

On May 29, 1984, Tideland and Liberty Mutual filed an appeal with the U.S. Fifth Circuit, docket number 84-4361. The Director, OWCP moved to dismiss the appeal on the basis that the Board's May 9, 1984, decision and order was not a "final order" subject to review. Sawyer, Rhodes, Tideland and Liberty Mutual all opposed the Director; however, the Fifth Circuit agreed with the Director and dismissed the appeal.

Thereafter, the case was remanded to Judge Walley for a medical and disability hearing. More delays were encountered when the Board inadvertently transferred the file to the Black Lung Program. Finally the file was located and the Administrative Law Judge held a hearing. On November 25, 1986, the ALJ ruled that Sawyer was entitled to weekly benefits of

$376.00 per week and that Rhodes was entitled to benefits of $270.00 per week. Because prior rulings had denied coverage, Liberty Mutual had ceased paying compensation in 1983, and therefore was ordered by the ALJ to pay Sawyer $100,000.00 and Rhodes $30,000.00 by December 6, 1986. These awards represented accrued, unpaid periodic compensation. Thus, by December 5, 1986, Tideland and Liberty Mutual were required to pay over $130,000.00 to the claimants or face a twenty percent penalty pursuant to 33 U.S.C. §914(f).

Believing they were being denied procedural due process because they were required to turn over property before a hearing was held before an Article III Court, Tideland and Liberty Mutual filed an Emergency Motion for a Stay and a

Petition for Review with the Fifth Circuit. At the same time, Liberty Mutual petitioned the Board to Stay the payment of the award. The Board construed the Motion as a Notice of Appeal from the ALJ's November 5, 1986, Order and on December 8, 1986, denied the request for a Stay. Meanwhile, the Fifth Circuit granted the Emergency Motion to Stay and set the case for expedited review.

On April 6, 1987, a panel of the Fifth Circuit heard oral argument on Petitioners' contentions and whether or not the Court had jurisdiction to hear the case. In an opinion reported at 817 F.2d 1211, the Fifth Circuit held that it lacked jurisdiction because the Board had not yet issued a "final order." The Court noted that Petitioners could assert their constitutional claims once the Board

entered its "final order." 817 F.2d at 1212. Because the Court vacated the stay, petitioners paid the claimants over $130,000.00 in a lump sum. No Article III Judge had nor has yet reviewed the Board's decision on the merits.

In the meantime, Sawyers and Rhodes contested the ALJ's award as inadequate. They initially filed a Motion for Reconsideration of the Award on December 5, 1986, but later withdrew the Motion and appealed to the Board on January 6, 1987. The ALJ granted the Motion to Withdraw on January 13, 1987. In April 1987, the Board dismissed the claimants' appeal as untimely. See Appendix A.

In March 1988, the Board issued a final order, affirming its prior holdings and rejecting the Petitioners' constitutional claims. The Petitioners

then appealed to the Fifth Circuit pursuant to that Court's appellate jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §921(c). After oral argument, Judges Thornberry, Williams, and Davis by decision dated August 24, 1989, vacated the order of the Benefits Review Board which had construed the Petitioners' appeal as timely, and dismissed Tideland's and Liberty Mutual's appeal. The Fifth Circuit panel concluded that Sawyer's and Rhodes' Motion for Reconsideration, despite its subsequent withdrawal by the claimants, voided the Petitioners' appeal to the Board. Tideland Welding and Liberty Mutual filed a Petition for Rehearing which was denied on September 18, 1989.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit erred in dismissing the Petitioners' appeal by relying on a procedure unauthorized by the Board's regulations, the effect of which denied the Petitioners' right to have the substantive issues, including the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, heard by an Article III Court, and erred by refusing to defer to the Board's own reasonable construction of its procedural regulations.

The Fifth Circuit's decision misapplies the governing procedures before the Administrative Law Judges and the Benefits Review Board, fails to adhere to the established jurisprudence requiring deference to the Board's interpreting and enforcing its rules and regulations, and deprives Petitioners of their constitutional right to due process. The Court's erroneous construction of the administrative procedures specifically deprives the Petitioners of their only

opportunity for review by an Article III Court of the issues repeatedly sought to be heard, namely the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, specifically §921(b)(3), and the situs aspect of the case.

The Petitioners have been denied their right to have the substantive issues of this long-suffering case heard by an Article III Court because of an unauthorized procedure used by the claimants Sawyer and Rhodes before the Administrative Law Judge. This is wrong and must not deprive the Petitioners of their appeal rights, the only chance for review on the merits by an Article III Court. The Court's holding is especially egregious where Sawyer's and Rhodes' unauthorized procedure is not set forth in the regulations, and under analogous

precedent, would not render the Petitioners' appeal untimely in any event.

The pertinent Code of Federal Regulations is 20 C.F.R. §802.205A. The portion of the regulation concerning the effect of a motion for reconsideration on the time for appeal is in §802.205A, reprinted again here:

> (a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the filing of the time for filing a notice of appeal.
>
> (b) (1) In a case involving a claim filed under the Longshoremen's and Harbor Worker's Compensation Act or its extensions (see §802.101(b)(1) - (5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than ten days from the date the

decision or order was filed in the office of the deputy commissioner.

. . . .

(c) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in §802.205.

(d) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in §802.205.

(e) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as

> premature. Following final action by the administrative law judge or deputy commissioner pursuant to either paragraph (c) or (d) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

The Fifth Circuit failed to distinguish between what procedures are authorized from what procedures are not authorized. There is no regulation providing for the withdrawal of a motion nor addressing the effect thereof.

The significance of 20 C.F.R. §802.205A, quoted above, and the absence of a regulation authorizing the withdrawal of a motion raised before the ALJ, is that the Court held that the Board "deviated" from its regulations regarding commencement of appeal time. The Board

could not, however, deviate from a regulation which did not exist. Section 802.205A provides only two alternatives for recommencing the time within which to file a notice of appeal. Those two are the granting of the motion for reconsideration and entry of a subsequent order, §802.205A(c), or the denial of the motion for reconsideration, §802.205A(d). Neither occurred, and the Court failed to acknowledge that only those two alternatives existed.

Importantly, the Fifth Circuit noted that "the regulation makes no exception for motions for reconsideration that are later withdrawn." Tideland Welding Service, et al v. Sawyer, et al, 881 F.2d 157, 160 (5th Cir. 1989). Failure of the regulation to make that exception is understandable, because withdrawal was a

procedure not authorized by the regulations.

If the result of withdrawing the Motion for Reconsideration is for the purposes of §802.205A that no motion was filed at all, then as the Board recognized the appeal filed by the Petitioners on December 3, 1986, was timely. If, on the other hand, despite the use of an unauthorized procedure--the withdrawal of the Motion for Reconsideration--the appeal is considered premature, the absurd result is that the time for appealing never recommenced as provided in §802.205A(c) and (d), and the Petitioners' only hope to have the original order reviewed by an Article III Court descended into procedural limbo. See §802.205A(e).

The Fifth Circuit itself has recognized that where an unauthorized

procedure is employed in proceedings below, the rights of parties to appeal are not thereby prejudiced. In Wheeler v. American Home Products Corp., 582 F.2d 891 (5th Cir. 1977), the District Court failed to comply with Federal Rule of Civil Procedure 58 by following a dismissal procedure not authorized: no separate judgment ordered the dismissal of an intervenor's claims when the principal demand was dismissed. The intervenor filed a Notice of Appeal. Subsequently, the order was amended to comply with Rule 58, entering a separate judgment dismissing the intervenor's claims. Despite the later amendment and entry of the order, the Fifth Circuit held that "the filing of the earlier notice of appeal is deemed under the circumstances to be a sufficient compliance with

Fed.R.Civ.P. 58." Wheeler, 582 F.2d at 893. Like Wheeler, the Petitioners had no control over the actions of Sawyer and Rhodes "withdrawing" their motion, nor of the ALJ's entertaining the withdrawal.

By analogy, in lawsuits "[a] voluntary dismissal without prejudice leaves the situation as if the action had never been filed." Wright & Miller, Federal Practice & Procedure, §2367, p. 186. The result is that any interruption of an applicable statute of limitation is retroactively eliminated, and the plaintiff may find himself time barred from his day in Court as in Taylor v. Bunge Corporation, 775 F.2d 617, 619 (5th Cir. 1985).

In accordance with these general principles, the Board correctly analogized its earlier decision of Niswander v.

Director, Office of Worker's Compensation Programs, 7 BLR 1-88 (1984), to determine that an abandoned motion for reconsideration did not suspend the running of the appeal time.

The Fifth Circuit recognized, yet ignored, that the rules and regulations of the Board deserve special deference. Tideland, 881 F.2d at 161. Indeed, this very Court has consistently cautioned reviewing courts "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525, 98 S.Ct. 1197, 1202 (1978). See also Jones v. Illinois Central Gulf R.R., 846 F.2d 1099, 1100-01 (7th Cir. 1988)(cited by the Fifth Circuit in Tideland, 881 F.2d

at 161).

The Fifth Circuit in the past has noted that an agency's procedural compliance is subject to closer scrutiny than an agency's rule making decisions. Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477, 1485-86 (5th Cir. 1983). Nevertheless, said the Fifth Circuit, "the ultimate question remains whether or not the agency's action was arbitrary and capricious, that is, unreasonable." Id., 1486.

Here, the Board's construction of 20 C.F.R. 802.205A was neither arbitrary nor capricious. It was the Fifth Circuit which arbitrarily ignored the only two operative provisions of 20 CFR 802.205A:

> (c) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed. . .

or

> (d) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed. . . .

The ALJ neither granted nor denied the claimant's Motion for Reconsideration. Therefore, no new time commenced to file an appeal and that is why the claimants' appeal was untimely; they failed to file an appeal to the Board within thirty days of November 25, 1986, the date on which the ALJ entered his judgment. 33 U.S.C. §921(a). Only Tideland and Liberty Mutual complied.

In this case, the Board did not violate its rules, nor was there any resulting prejudice. The only prejudice occurred when the Fifth Circuit "engraft[ed] their own notions of proper

procedures" which denied Tideland and Liberty Mutual their appeal rights. As the Seventh Circuit said in Cook v. Director, Office of Worker's Compensation Programs, 816 F.2d 1182, 1187 (7th Cir. 1987), "...close cases of interpretation of an administrative regulation must be resolved in favor of the administrator's interpretation. . . ."

This case is not even a "close case of interpretation" of the regulations. As set forth above, withdrawal of a motion for reconsideration was not envisioned by the regulations. Contrary to the Fifth Circuit's decision, the Board could not "deviate" from such a regulation, because it did not exist.

It is important that in each of the cases cited by the lower Court which reversed Board procedural decisions, the

Court faced circumstances falling within the regulation's plain wording. Those cases did not involve interpreting a regulation where more than one reasonable construction was available nor where the regulation did not apply to the case.

CONCLUSION

The issue presented here is not merely construing an administrative agency's procedural rule. The case involves much more. The Petitioners do not believe that the claimants satisfy the situs test for coverage under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. See e.g., Texports Stevedore Company v Winchester, 632 F.2d 504 (5th Cir. 1980).

The Petitioners have sought review before an Article III Court of the Board's holding in favor of the claimants for

years. Moreover, the Petitioners have raised serious questions about the constitutionality of 33 U.S.C. §921, which forces an employer to part with property--money--to a third party--a claimant--before any review is available before an Article III court. Certainly, "it is too late in the day . . . for decisions on the merits to be avoided on the basis of . . . mere technicalities." Foreman v. Davis, 371 U.S. 178, 181-82, 83 S.Ct 227, 230 (1962). This quotation is even more appropriate here, where the Fifth Circuit engrafted the "technicality" onto the procedure ex post facto.

For the above reasons, Tideland and Liberty Mutual request this Court to grant their Petition for Writ of Certiorari and to reverse the Fifth Circuit's decision.

KEVIN R. TULLY (#1627)
CHRISTOVICH & KEARNEY
Pan American Life Center
Suite 2300
601 Poydras Street
New Orleans, LA 70130
Telephone: (504)561-5700
ATTORNEYS FOR TIDELAND
WELDING SERVICE and LIBERTY
MUTUAL INSURANCE COMPANY

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the above and foregoing have been served upon counsel of record by depositing same in the United States Mail, postage paid, this

_____day of December, 1989.

KEVIN R. TULLY

APPENDIX A
BENEFITS REVIEW BOARD

WALTER SAWYER	)	BRB Nos. 86-3048
	)	and 86-3048A
	)	Case No. 81-LHCA-2135
	)	OWCP No. 7-71798
Claimant-Respondent	)	
Cross Petitioner	)	
	)	
v.	)	
	)	
TIDELAND WELDING SERVICE	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondent	)	
	)	
GLYNN RHODES	)	BRB Nos. 86-3049
	)	and 86-3049A
	)	Case No. 81-LHCA-2136
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
TIDELAND WELDING SERVICE	)	
and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	ORDER

The Board acknowledges receipt of claimants' consolidated Notice of Appeal in the captioned case. Claimants appeal the administrative law judge's Decisions and Orders, filed November 25, 1986 and Order on Reconsideration, filed January 13, 1987. The appeals have been assigned the Board's docket numbers BRB No. 86-3048A, with respect to claimant Sawyer, and BRB No. 86-3029A with respect to claimant Rhodes. Any future correspondence concerning claimants' appeals must bear these numbers.

On November 25, 1986, the administrative law judge's Decisions and Orders on Remand-Award of Benefits were filed in the Office of the Deputy Commissioner in the above-captioned cases. Employer/carrier thereafter filed a Motion for Stay of Payments and supporting

memorandum. By Order dated December 8, 1986, the Board also considered employer's motion to be an appeal of the administrative law judge's Decisions and Orders, filed November 25, 1986. By the same Order, employer/carrier's motion for stay of payments was denied and the case was set for expedited review.

On December 5, 1986, claimants filed a motion for reconsideration of the administrative law judge's Decisions and Orders, filed November 25, 1986. Ten days later, claimants filed a motion to withdraw their motion for reconsideration. Claimants then filed a Notice of Appeal on January 6, 1987. The administrative law judge in his Order, filed January 13, 1987, granted claimants' request to withdraw their motion for reconsideration of the initial Decisions and Orders.

Pursuant to Section 802.205A(a) of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.205A(a), a timely motion for reconsideration of a decision or order of the administrative law judge shall suspend the time for filing a notice of appeal. 20 C.F.R. §802.205. However, the Board has held that if a party elects to file a motion for reconsideration rather than file its appeal before the Board, it cannot thereafter abandon its motion for reconsideration and have its appeal time to the Board extended by the abandoned motion. See Niswander v. Director, OWCP, 7 BLR 1-88 (1984). This is particularly true where claimants by filing and then withdrawing a motion for reconsideration have potentially rendered employer's appeal premature and subject to dismissal.

20 C.F.R. §802.205A(a). Since claimants withdrew their motion, we view it as without effect. Therefore, the appeal time began to run on November 25, 1986. We note that even if we viewed the motion for reconsideration as effective, claimants' appeals are nonetheless untimely because filed prior to the administrative law judge's Order on the Motions.

In view of the foregoing, claimants' appeals, BRB No. 86-3048A (Sawyer) and BRB No. 86-3049A (Rhodes), are dismissed as untimely filed. 20 C.F.R. §802.205.

The Board has received a consolidated Petition for Review and brief filed by employer/carrier, petitioners in BRB Nos. 86-3048 and 86-3049. 20 C.F.R. §802.210. Response briefs may be filed within thirty (30) days from receipt of this Order. 20 C.F.R. §802.211.

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

Dated this 22nd
Day of April 1987

APPENDIX B

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

VS. NO. 88-4280

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, U.S.
DEPARTMENT OF LABOR,
Respondents

United States Court of Appeals,
Fifth Circuit

August 24, 1989
Rehearing and Rehearing En Banc
Denied September 18, 1989

Injured workers sought to recover compensation under Longshoremen's and Harbor Workers' Compensation Act. The Benefits Review Board affirmed award of benefits, and appeal was taken. The Court of Appeals, Thornberry, Circuit Judge, held that time for filing notice of appeal

was measured from date administrative law judge ruled on motion to withdraw motion for reconsideration.

Vacated; appeal dismissed.

Workers' Compensation 1877

For purpose of appealing award or denial of compensation under Longshoremen's and Harbor Workers' Compensation Act, time for filing notice of appeal is measured from date administrative law judge rules on motion to withdraw motion for reconsideration.

Kevin R. Tully, Robert E. Peyton, Christovich & Kearney, New Orleans, for petitioners.

Lawrence A. Arcell, Barker, Boudreaux, Lamy & Foley, New Orleans, Joshua T. Gillelan, II, Washington D.C., for respondents.

Linda M. Meekins, Clerk, BRB, Department of Labor, Washington, D.C., for other interested parties.

Petition For Review of Orders of the Benefits Review Board.

Before THORNBERRY, WILLIAMS, and DAVIS, Circuit Judges.

THORNBERRY, Circuit Judge:

The petitioners Tideland Welding Service ("Tideland") and Liberty Mutual Insurance Company ("Liberty Mutual") appeal a Benefits Review Board ("the Board") finding that the respondents Walter Sawyer ("Sawyer") and Glynn Rhodes ("Rhodes") were entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

In 1980, Tideland employed Sawyer and Rhodes as welders assigned to the McDermott Shipyard in Morgan City, Louisiana. On June 21, 1980, Tideland excused the respondents from work early due to heavy rain. While travelling in the same car on U.S. 90, the respondents were injured in a collision, which

occurred just under two miles from where they worked.

Sawyer and Rhodes sought compensation pursuant to the LHWCA. The Deputy Commissioner of the Department of Labor denied their claims. An Administrative Law Judge ("the ALJ") later held a full hearing and, in December 1982, found that the place where the accident occurred did not constitute a maritime situs and that the respondents were not in the course or their employment at the time of the accident. Sawyer and Rhodes appealed the ALJ's decision to the Board. In May 1984, the Board reversed the ALJ, finding that the accident occurred on a covered situs and that the respondents were in the course of their employment. The Board remanded the case to the ALJ to determine the measure of compensation to which the

respondents were entitled.

Tideland and Liberty Mutual[1] then appealed the Board's decision to this court. We held that the Board's decision was not a final order subject to appellate review.

On November 25, 1986, on remand, the ALJ ruled that Sawyer was entitled to weekly benefits of $376.00 per week and that Rhodes was entitled to benefits of $270.00 per week. Because Liberty Mutual had not paid anything to the respondents since 1983, the ALJ ordered Liberty Mutual to pay Sawyer $100,000 and Rhodes $30,000 by December 6, 1986. These awards represented accrued unpaid periodic compensation.

---

[1]Hereafter, when referring to Liberty Mutual we are referring to the collective actions of Liberty Mutual and Tideland.

In early December 1986, Liberty Mutual petitioned the Board to stay the payment of the award. The Board construed the motion as a notice of appeal from the ALJ's November 25, 1986 order and on December 8, 1986 denied the request for a stay.

Between the time Liberty Mutual sent its motion for a stay to the Board and the time the Board acted on the motion, Liberty Mutual filed a motion for an Emergency Stay and a Petition for Review with the Fifth Circuit on the grounds that the ALJ's decision violated the company's due process rights by depriving it of property without a hearing before an Article III court. We granted the Motion for an Emergency Stay, but, later vacated the stay because the Board had not yet

issued a final order.

In the meantime, the respondents contested the ALJ's award as inadequate. They initially filed a motion for reconsideration of the award on December 5, 1986, but later withdrew the motion and appealed to the Board on January 6, 1987. The ALJ granted the motion to withdraw on January 13, 1987. In April 1987, the Board dismissed the respondents' appeal as untimely.

The Director of the Office of Workers' Compensation Programs of the Department of Labor ("The Director of the OWCP") then filed a motion for reconsideration with the Board, urging that both the respondents' and Liberty Mutual's notices of appeal were premature. The Board denied the Director of the

OWCP's motion and after reviewing Liberty Mutual's appeal affirmed the ALJ's award.

The Director of the OWCP renews his earlier contention that Liberty Mutual's notice of appeal was premature and, accordingly, that the Board should have dismissed the appeal. If the Board erred in hearing Liberty Mutual's appeal, we do not have jurisdiction to review the case. To aid in the review of this issue, we have recited the operative dates:

11/25/86 the ALJ entered a judgment ordering Liberty Mutual to pay the respondents $130,000
12/3/86 Liberty Mutual filed a motion for a stay with the Board
12/5/86 the respondents filed a motion for reconsideration with the ALJ
12/8/86 the Board denied Liberty Mutual's motion for stay and stated it would consider the motion a notice of appeal
12/15/86 the respondents filed a motion to withdraw their motion for reconsideration
1/6/87 the respondents filed a notice of appeal
1/13/87 the ALJ granted the respondent's

motion to withdraw their motion for reconsideration
4/22/87 the Board dismissed the respondents' appeal

Our review is limited to the timeliness of Liberty Mutual's notice of appeal. The Board twice ruled on the timeliness issue. First, in response to the Director of the OWCP's motion for reconsideration, alleging that Liberty Mutual's notice of appeal was untimely, the Board denied the motion without stating its reasoning. Second, the Board ruled that the respondents' notice of appeal was untimely. Although the Board's dismissal of the respondents' appeal is not before us, the reasons the Board gave for dismissing their appeal are relevant to our review of the Board's decision to hear Liberty Mutual's appeal.

Because we do not know the grounds

on which the Board found Liberty Mutual's notice of appeal to be timely, we must turn to the applicable statute, the regulations passed pursuant to the statute, and the statements the Board made when reviewing the timeliness of the respondents' notice of appeal to discern the effect of a withdrawal of a motion for reconsideration on the time for filing a notice of appeal.

The statute governing appeals to the Board provides that:

> [a] compensation order shall become effective when filed in the office of the deputy commissioner ..., and, unless proceedings for the suspension or setting aside of such order are instituted ..., shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C.A § 921(a). This statute is jurisdictional and there is no equitable relief available if a party fails to

object within the prescribed time period. Townsend v. Director, Office of Workers' Compensation Programs, 743 F.2d 880 (11th Cir. 1984).

Pursuant to the above statute, the Board promulgated regulations governing the effect of a motion for reconsideration on the time for filing a notice of appeal. The applicable regulations provide that "[a] timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal." 20 C.F.R. § 802.205A(a)(1987).[2] The regulation further provides that:

> [i]f a timely motion for

---

[2]These regulations were later amended. We are relying on the regulations that were in effect at the time the Board rendered its decision.

> reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature. Following final action by the administrative law judge or deputy commissioner . . ., a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

20 C.F.R. § 802.205A(e)(1987).

As a preliminary matter, if the respondents had not withdrawn their motion for reconsideration and the ALJ had ruled on the merits of the motion, any notice of appeal filed prior to the judgment on the motion would have been premature. Jones v. Illinois Central Gulf Railroad, 846 F.2d 1099 (7th Cir. 1988). In the instant case, the respondents filed a perfected motion for reconsideration and later withdrew it. The issue before this

court is the effect of the respondents' withdrawal of their motion for reconsideration on the timeliness of Liberty Mutual's notice of appeal.

The Board provided two interpretations of the regulations when discussing the timeliness of the respondents' notice of appeal. First, the Board held that when a party files and subsequently withdraws a motion for reconsideration, the notice of appeal must be filed within 30 days of the original judgment from which the party seeks an appeal. Second, the Board held that even if the respondents' motion for reconsideration tolled the filing time for a notice of appeal, the respondents filed their notice of appeal before the ALJ ruled on their motion to withdraw and the

notice of appeal was, therefore, premature.

We find no support for the Board's statement that a perfected motion for reconsideration that is later withdrawn fails to toll the period for filing a notice of appeal. 20 C.F.R. §802.205A(e)(1987) explicitly states that "any appeal to the Board, whether filed prior to or subsequent to the filing of a timely motion for reconsideration, shall be dismissed as premature." The regulation makes no exception for motions for reconsideration that are later withdrawn. Furthermore, the Board's interpretation could render substantial injustice to the party opposing a motion for reconsideration. For example, if a party filed a motion for reconsideration,

the opposing party would read the regulation stating that any notice of appeal filed before resolution of the motion for reconsideration would be premature, and would then wait until the ALJ ruled on the motion for reconsideration before filing a notice of appeal. If the party moving for reconsideration later moved to withdraw the motion more than thirty days after the original judgment, under the Board's interpretation, the opposing party would lose the right to appeal.

The Board relies on Niswander v. Director, Office of Workers' Compensation Programs, 7 BLR 1-88 (1984), where the Board held that an unperfected motion for reconsideration cannot toll the time for filing a notice of appeal. Niswander is

distinguishable from the instant case. In Niswander, the party moving for reconsideration did not file a perfected motion. In the instant case, the plaintiffs filed a perfected motion detailing several grounds of alleged error. The plaintiffs' motion was not frivolous or lacking in substance.

We find more credibility in the Board's alternative interpretation that the time fore filing a notice of appeal is measured from the date that the ALJ ruled on the motion to withdraw the motion for reconsideration. The regulations governing the Board state that a notice of appeal filed before or after a motion for reconsideration is premature. The regulations further provide that "[f]ollowing final action by the

administrative law judge or deputy commissioner [dismissing or granting the motion for reconsideration], a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal." Although the regulation does not address the result when a legitimate motion for reconsideration is withdrawn, as compared to a motion granted or dismissed by the ALJ, we find the distinction between a withdrawn and a dismissed motion inapposite in this situation. In its alternative holding, the Board itself did not distinguish a withdrawn from a dismissed motion. Based on the above analysis, the Board held that the respondent's failure to file a notice of appeal within thirty days of the ALJ's ruling on the motion to withdraw the

motion for reconsideration precluded the respondents from obtaining review of the underlying judgment. Like the respondents, Liberty Mutual failed to file a new notice of appeal after the ALJ ruled on the motion to withdraw the motion for reconsideration. We see no reason why the Board's alternative interpretation should not apply equally to Liberty Mutual's notice of appeal.

We recognize that the rules and regulations of the Board deserve special deference. Jones, 846 F.2d 1099. We also recognize that this deference is not appropriate when the Board deviates from its own regulations. See Kephart v. Director, Office of Workers' Compensation Programs, 701 F.2d 22 (3rd Cir. 1983)(reversing the Board's dismissal of

an action on grounds of abandonment where the court found the Board's construction of the regulation erroneous); Grimmett v. Director, Workers' Compensation Programs, 826 F.2d 1015 (11th Cir. 1987)(reversing the Board's dismissal of an appeal as untimely where the Board measured the time for filing a notice of appeal from the date of the original judgment, not the date of the amended, final judgment); Pearce v. Director, Workers' Compensation Programs, 647 F.2d 716 (7th Cir. 1981)(reversing the Board where it failed to follow its own regulations); Youghiogheny & Ohio Coal Co. v. Benefits Review Board, 745 F.2d 380 (6th Cir. 1984)(reversing the Board's dismissal of an appeal where the Board did not abide by its procedural rules). As

this and other courts have repeatedly held, "[s]hould an agency in its proceedings, violate its rules and prejudice result, the proceeding are tainted and any actions resulting from the proceeding cannot stand." Hall v. Schweiker, 660 F.2d 116,119 (5th Cir. 1981), citing Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386 (5th Cir. 1966) and Alamo Express, Inc. v. United STates, 613 F.2d 96 (5th Cir. 1980). Here, the Board adhered to its own regulations when it dismissed the respondents' appeal on the grounds that they should have filed a new notice of appeal after the ALJ ruled on the motion to withdraw the motion for reconsideration; yet, the Board deviated from these same regulations when it found

Liberty Mutual's notice of appeal timely. We, thus, hold that the Board erred in hearing Liberty Mutual's appeal. For the foregoing reasons, we VACATE the Board's decision on the merits and DISMISS Liberty Mutual's appeal.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4280

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

VS. NO. 88-4280

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, U.S.
DEPARTMENT OF LABOR,
Respondents

Petition for Review of an Order of the
Benefits Review Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/24/89, 5th Cir. 198__,
_____ F.2d _____)

(September 18, 1989)

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-6

(2)

NO. 89-960

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY
Petitioners

VERSUS

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS, WALTER SAWYER AND GLYNN RHODES IN OPPOSITION

Harold J. Lamy
BARKER, BOUDREAUX, LAMY & FOLEY
FNBC Building, Suite 1122
210 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 586-9395
Attorney for Respondents,
Walter Sawyer and Glynn Rhodes

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

16pp

QUESTIONS PRESENTED

I. Did the United States Court of Appeal for the Fifth Circuit err in dismissing petitioner's appeal by ruling the appeal had not been filed timely, pursuant to 33 U.S.C. §921(a) and 20 C.F.R. §802.205(A)(1987)?

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No. 89-960

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

TIDELAND WELDING SERVICE and
LIBERTY MUTUAL INSURANCE COMPANY
Petitioners

VERSUS

WALTER SAWYER, GLYNN RHODES and
DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS, WALTER SAWYER AND GLYNN RHODES IN OPPOSITION

This case is not worthy of the attention of the Supreme Court on certiorari. The case involves no federal question as to which there is a conflict among federal circuit courts. Similarly, the decision of the lower courts in this case do not conflict with any decision of this Court. Finally, no special or important reasons exist that merit, much less compel, review. The petitioners therefore cannot show the case meets any of the applicable criteria for granting certiorari stated in Rule 17 of the Rules of the United States Supreme Court.

STATEMENT OF THE CASE

Respondents, Walter Sawyer and Glynn Rhodes were employees of Tideland Welding Service in 1980. They were welders who were assigned to work at the McDermott Shipyard a shipping and maritime repair-fabrication facility, in Amelia, Louisiana, immediately adjacent to Bayou Bouef, a navigable body of water. They had been employed by Tideland for several months and during that period of time had worked on many different jobs at the McDermott Shipyard. At the time of the incident in question they had been temporarily assigned to work at the McDermott yard on the west bank of Bayou Bouef, repairing and refitting barges.

During respondents' employment at the McDermott facility they had worked on both sides of Bayou Bouef, in the east bank and west bank shipyards of McDermott. On several occasions, in the two month period preceding the incident herein, respondents would begin work on the west bank, and during the day have to drive to the east bank in order to complete their work. To move from the west bank to the east bank, Sawyer and Rhodes would have to use their own car, an would drive on a public highway, U.S. 90. *This road was the only road that connected the east bank yard to the west bank yard.* To get from the west bank to the east bank yard the respondents would have to drive up to U.S. 90 from the west bank yard, cross over the Amelia Bridge which spanned Bayou Bouef and turn into the east bank yard. On the date of the accident this is the exact route taken by Sawyer and Rhodes.

On Saturday, June 21st, 1980, Sawyer and Rhodes were working on the west side of Bayou Bouef in the McDermott yard. Work had been slow that day because of rainy weather, and shortly after 5:00 P.M. they were

advised by the McDermott supervisors to stop work for the day. The supervisors also advised the respondents they would be paid until 6:00 P.M.

Respondents left the west bank yard proceeding in a northerly direction to U.S. 90, which was their common route of exiting the yard. Respondent Rhodes was driving the vehicle, which was owned by Respondent Sawyer. When they reached U.S. 90, they turned right or easterly. They immediately began to ascend the Amelia Bridge which spanned Bayou Bouef. On the descending protion of the bridge and *shortly before* the intersection of U.S. Highway 90 and Louisiana Highway 662, (which was the entrance to McDermott's east bank yard), respondents were involved in an automobile accident in which both were severly injured.

The accident occurred *between the entrances* to the west bank of the shipyard and the east bank of the shipyard on the only road which connects the two entrances, the only road which could by used to travel between the two parts of the shipyard. At the time of the accident the respondents' vehicle had not yet passed the east bank entrance to the shipyard as the vehicle moved in an easterly direction.

In the accident both respondents were severly injured and rendered totally disabled from returning to their former types of work. Since the date of the accident Rhodes had returned to employment on a limited basis but ceased employment in January of 1988 due to his injuries. Sawyer has never returned to gainful employment.

Subsequent to that time, Liberty Mutual Insurance Company bagan payments of compensation, first under the Longshore and Harbor Workers' Compensation Act.

U.S.C. §901 *et seq* (LHWCA) and subsequently under the Louisiana Workers' Compensation Statute L.R.S. 23:1061, *et seq*, until 1983, when petitioner Liberty Mutual Insurance Company unilaterally ceased paying compensation.

Respondents filed claims for compensation with the Department of Labor in 1981, which denied the claim. A full hearing was then held in 1982 before an administrative law judge who also denied the claim.

On the initial appeal to the Benefits Review Board, in a decision rendered May 9, 1984, the Board found the ALJ had erred in his decision *as a matter of law*. The Board fond that certain facts presented at the hearing, established without contradiction by evidence, resulted in the conclusion the location of the accident was an adjoining area to navigable waters customarily used by an employer in repairing or building vessels, and respondents were in the course of their employment at the time of the accident.

Subsequent to the Board's decision, petitioners herein Tideland and Liberty Mutual Insurance Company, filed an appeal with the United States Court of Appeals, Fifth Circuit, which dismissed the appeal because the decision and the order of the Benefits Review Board was not subject to review as a final order. The claim was remanded to the administrative law judge for further consideration of the disability and medical issues. *Tideland Welding Service v. Director, OWCP*, 817 F.2d 1211 (5th Cir. 1987).

At this point, chronologically, the issues before this Court begin to arise.

On *November 25, 1986*, the administrative law judge ruled on the disability issues finding claimant Sawyer was

entitled to weekly benefits of $376.00 per week. Because of the conscious decision by petitioners to not pay the claims during the pendency of the litigation, the decision of the administrative law judge resulted in payments to Sawyer of over $100,000.00 and to Rhodes of over $30,000.00. It is important to note these compensation amounts ordered under the award were unpaid periodic compensation which had accrued.

On *December 3, 1986,* the Benefits Review Board received a petition for stay of the ALJ's decision and award, which it construed as a Notice of Appeal.

On *December 3, 1986,* the claimants filed an unauthorized emergency motion to stay the execution of the ALJ's Decision and Order, with the United States Court of Appeal, Fifth Circuit.

On *December 4, 1986,* the Fifth Circuit granted the unauthorized emergency motion to stay.

On *December 5, 1986,* respondents filed a Motion for Reconsideration with the Administrative Law Judge contending the ALJ's Decision and Order was incorrect. See Appendix A.

On *December 8, 1986,* the Benefits Review Board denied the petitioners' motion for stay and docketed the motion as an appeal of the ALJ's Decision and Order.

On *December 15, 1986,* respondents moved to withdraw their Motion for Reconsideration.

On *December 16, 1986,* the Director, Office of Workers Compensation Programs (OWCP), filed a motion to dismiss the proceedings before the Fifth Circuit.

On *January 6, 1987,* respondents filed a Notice of Appeal with the Benefits Review Board.

On *January 9, 1987,* the Administrative Law Judge granted the respondents' Motion to Withdraw the Motion for Reconsideration.

On *January 13, 1987,* the order granting the withdrawal of the respondents' Motion for Reconsideration was filed.

On *April 22, 1987,* the Benefits Review Board, *sua sponte,* dismissed respondents' appeal as untimely.

On *March 31, 1988,* the Board issued an unpublished final order, upholding the findings of the ALJ's Decision and Order of November 25, 1986. In its decision, the Board rejected all of petitioners' claims, including the constitutional claims.

Subsequently, petitioners appealed this decision to the Fifth Circuit, which dismissed the appeal, finding petitioners' appeal to the Benefits Review Board had been untimely and therefore, it could not appeal that decision.

In the petition for writ of certiorari, petitioner repeatedly characterized respondents' withdrawal of their Motion for Reconsideration as "unauthorized". However, petitioners are unable to cite any statute or regulation to support this contention.

Further, petitioners argue the Fifth Circuit allegedly erred in (1)dismissing the petitioners' appeal by relying on a procedure allegedly unauthorized by the Benefit Review Board's regulation and (2)by refusing to defer to the Board's construction of its regulations.

In fact, it is petitioners who erred in this matter by not being able to follow the regulations and timely file the necessary pleadings in order to preserve its rights under the statutes and procedural regulations of the Benefits Review Board. Petitioners had no qualms about filing an "emergency appeal" on December 3, 1986, to illegally stop the rightful payment of accrued compensation benefits to respondents, although no where in the Federal Rules of Civil Procedure, or the procedural regulations promulgated in the Code of Federal Regulations, is this procedure allowed.

The Fifth Circuit has merely directed the Benefits Review Board to apply its regulations equally to all parties in this matter. Factually, the Fifth Circuit's findings are not clearly erroneous. This Court need not even consider whether the Fifth Circuit erred in some other respect in reversing the Benefits Review Board.

SUMMARY OF ARGUMENT

I. The Fifth Circuit dismissal of petitioners appeal was proper and it correctly concluded the Benefits Review Board failed to abide by its own procedural regulations in allowing petitioners' appeal to the Board although petitioners failed to timely file its Notice of Appeal with the Board. *Tidelands Welding Service and Liberty Mutual Insurance Company v. Walter Sawyer, et al*, 881 F.2d 157 (5th Cir. 1989). Accordingly, the application for certiorari should be denied.

ARGUMENT

I. THE PETITIONERS FAILED TO TIMELY PERFECT ITS APPEAL TO THE BENEFITS REVIEW BOARD, AND THE COURT OF APPEAL CORRECTLY CONCLUDED THIS FAILURE BARRED PETITIONERS' APPEAL TO THE FIFTH CIRCUIT

Failure of a party to litigation to act timely and thus be denied certain remedies is unfortunate. This is especially true where the failure to act timely denies a party the opportunity to present its case on the merits. However unfortunate the procedural misstep which is the crux of the matter at bar, it cannot be ignored at the expense of the rights of another party to the litigation.

Procedural confusion is rampant in this case, as reflected in the facutal recitation, *supra*. But, it must be noted, this confusion was initiated by petitioners, not the respondents.

Petitioners filed an "illegal" or "unauthorized" Emergency Motion for Stay with the Fifth Circuit on December 3, 1986, although this procedure is not recognized or authorized by the Federal Rules of Civil Procedure. It was filed prior to the signing of a "final order" from the Benefits Review Board; a "final order" being a predicate act required by 33 U.S.C. §921(c), which provides in pertinent part:

> "Any person adversely effected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the United States Court of Appeal for the circuit in which the injury occurred by filing in such court within sixty (60) days following the issuance of such board order a written petition praying that they ought to be modified or set aside."

The Fifth Circuit recognized petitioners' efforts to circumvent the applicable rules and regulations, albeit six months after the unauthorized motion was filed, and ultimately dismissed the appeal, noting petitioners had an "obligation to await a final decision before appeal..." *Tidelands Welding Service v. Director, Office of Workers' Compensation Programs, et al,* 817 F.2d 1211, 1212 (5th Cir. 1987).

Because of this unauthorized "Emergency Motion to Stay", respondents were forced to wait an additional seven months before they were paid the accrued compensation awarded to them by the Administrative Law Judge.

Further, petitioner compounded the confusion by filing the Motion for Stay with the Benefits Review Board at the same time the unauthorized Motion for Stay was filed with the Fifth Circuit. Now petitioners inferentially complain respondents engaged in an unauthorized activity which has cause petitioners to lose its right to appeal. nothing could be further from the truth. If fact, it was petitioners' lack of diligence which led to its current predicament.

The regulations in question, 20 C.F.R. §802.205 is jurisdictional, and like the parallel provisions of Federal Rules of Appellate Procedure 4(a)(4), it must be applied as it is written.

Respondents filed a timely motion for reconsideration before the ALJ. This motion conformed to all rules and regulations in reciting respondents' specific objections to the ALJ's Decision and Order. As per 20 C.F.R. §802.205A(a), this motion

> shall suspend the running of the time for filing a notice of appeal,

and further,

> [i]f a timely motion for reconsideration of [an ALJ's decision and order] is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature. Following final action by the administrative law judge...a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal.

20 C.F.R. §802.205A(e).

Respondents filed a timely motion for reconsideration thereby fulfilling the only requirement of the regulations. Therefore, an appeal filed before this time was premature and "shall" be dismissed.

However, the Board chose to ignore its own rules, and in its order of April 22, 1987, dismissed respondents' appeal because it was filed "prior to the administrative law judge's Order on the Motion." Order of Benefits Review Board, *see* Appendix A, p. 5, Writ for Certiorari filed by Petitioners.

This resulted in the anomalous situation of petitioners being allowed to proceed with its appeal, although obviously filed prematurely, while respondents, who also filed their appeal prematurely, being denied the right to proceed with their appeal.

The Fifth Circuit's decision below did nothing more than correct the Benefit Review Board's misstatement of the regulations.

This Court has reviewed a factually similar situation to the one at issue in *Griggs v. Procident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225

(1982), although F. R. App. Proc. Rule 4(a)(4) was interpreted.

The Court in *Griggs* held the lack of jurisdiction resulting from the prematurity of an appeal notice, pursuant to F. R. App. Pro. Rule 4(a)(4), cannot be ignored, even though it may deprive a party of the opportunity for review. Under F. R. App. P. Rule 4(a)(4), as under 20 C.F.R. §802.205A(a) and (e), a prematurely filed motion for appeal is

> not merely defective; it [is] a nullity. Under the plain language of the...Rule, a premature notice of appeal "shall have not effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all...It is well settled that the requirement of a timely notice of appeal is " 'mandatory' and jurisdictional.' "

Griggs, supra, 459 U.S. at 61; (citations omitted).

The Board's regulation established precisely the same rule concerning motions for reconsideration before the ALJ. These regulations are also "mandatory and jurisdictional" and lead to the same result - dismissal of any and all premature appeals.

There is no justification for the Board accepting petitioners' appeal below while rejecting respondents', even under the Board's theory as posited in its Order of April 22, 1987. Appendix "A", Writ of Certiorari filed by Petitioners. By filing and then withdrawing a motion for reconsideration, respondents did not "potentially [render petitioners'] appeal premature and subject to dismissal." Appendix "A", p. A-5, Writ of Certiorari filed by Petitioners. Rather, the timely *filing* of the motion for reconsideration mandated dismissal of the appeal.

In its reasoning, the Board misses the point. The fact petitioners were precluded from filing an appeal pursuant to 33 U.S.C. §921 arose not because of respondents' withdrawal of its motion for reconsideration, but rather from petitioners' own failure to read the regulations and file a new appeal within 30 days of the January 13, 1987 order of the ALJ, as directed by 20 C.F.R. §802.205(e).

Throughout its brief, petitioners imply some devious or ulterior motive on the part of respondents in thier "unauthorized" withdrawal of the motion for reconsideration. Nothing in the record evinces any motivation by respondents other than to protect their right to compensation, something petitioners have fought to delay or deny for almost 10 years. Respondents did not need to have the ALJ's 1986 decision reconsidered under 20 C.F.R §802.205A as relief is also available under 33 U.S.C. §922.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Harold J. Lamy
BARKER, BOUDREAUX, LAMY & FOLEY
FNBC Building, Suite 1122
210 Baronne Street
New Orleans, Louisiana 70112
Telephone: (504) 586-9395
Attorney for Respondents,
Walter Sawyer and Glynn Rhodes

Supreme Court, U.S.
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CLERK

No. 89-960

In the Supreme Court of the United States

OCTOBER TERM, 1989

TIDELAND WELDING SERVICE, ET AL., PETITIONERS

v.

WALTER SAWYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Senior Appellate Attorney

ANNE PAYNE FUGETT
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, on a petition for review of the Benefits Review Board's decision awarding compensation to two employees under the Longshore and Harbor Workers' Compensation Act, the court of appeals properly dismissed the petition on the ground that the Board lacked jurisdiction over petitioners' appeal from the decision of the administrative law judge.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B21) is reported at 881 F.2d 157. The opinions and orders of the Benefits Review Board (Pet. App. A1-A6; App., *infra*, 1a-2a, 3a-8a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1989. A petition for rehearing was denied on September 18, 1989. Pet. App. C1-C2. The petition for a writ of certiorari was filed on December 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner Tideland Welding Service employed Walter Sawyer and Glynn Rhodes as welders at a shipyard in Morgan City, Louisiana. After leaving work on June 21, 1980, Sawyer and Rhodes were injured in a car accident. Sawyer and Rhodes later filed claims for compensation with the Director, Office of Workers' Compensation Programs, United States Department of Labor (Director), under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Sawyer and Rhodes sought compensation from petitioner Tideland Welding Service and its insurer, petitioner Liberty Mutual Insurance Company. After a hearing, an administrative law judge denied those claims in December 1982, concluding that "the place where the accident occurred did not constitute a maritime situs and that [Sawyer and Rhodes] were not in the course o[f] their employment at the time of the accident." Pet. App. B4.

In May 1984, the Benefits Review Board reversed that decision, concluding that Sawyer and Rhodes should be compensated. The Board therefore remanded the case to the ALJ "to determine the measure of compensation." Pet. App. B4. Petitioners filed an appeal from the Board's decision to the Fifth Circuit. The court of appeals dismissed that appeal on the ground that the Board's decision was not a final order subject to appellate review. *Id.* at B5-B6.

2. On November 25, 1986, the ALJ issued his decision on remand, awarding weekly benefits of $376 to Sawyer and $270 to Rhodes. Because petitioner Liberty Mutual had not paid either claimant any benefits since the date of the accident, the ALJ also

ordered Liberty Mutual to pay Sawyer $100,000 and Rhodes $30,000 by December 6, 1986. Pet. App. B5. On December 3, petitioners asked the Benefits Review Board to stay the ALJ's award. On December 5, Sawyer and Rhodes filed a motion for reconsideration before the ALJ. *Id.* at B5-B6, B8.

On December 8, 1986, the Board, construing petitioners' request for a stay as both a notice of appeal and a motion to stay, docketed the case for review and denied the stay.[1] One week later, Sawyer and Rhodes asked the ALJ for permission to withdraw their previously filed reconsideration motion. On January 6, 1987, while that withdrawal request was pending before the ALJ, Sawyer and Rhodes also filed an appeal from the ALJ's decision to the Benefits Review Board. And on January 13, 1987, the ALJ granted the request to withdraw the reconsideration motion. Pet. App. B6-B7.

3. a. In April 1987, the Benefits Review Board dismissed the appeals filed by Sawyer and Rhodes. Pet. App. A1-A6. The Board concluded that those appeals were filed outside the 30-day deadline set forth in 33 U.S.C. 921(a).[2] "Since claimants withdrew their

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[1] Petitioners had also filed a motion for an emergency stay in the court of appeals, together with a petition for review of the ALJ's decision. The court of appeals initially granted a stay. On June 1, 1987, the court of appeals dissolved that stay and dismissed petitioners' appeal for lack of jurisdiction under 33 U.S.C. 921(c). Pet. App. B6-B7; *Tideland Welding Service* v. *Director, OWCP*, 817 F.2d 1211 (5th Cir.).

[2] Section 921(a) provides:

> A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted

motion [for reconsideration]," the Board concluded that the motion was "without effect," and could not trigger the tolling provision of 20 C.F.R. 802.205A (a) (1987). Pet. App. A4-A5.[3] Alternatively, the Board concluded that even if the motion for reconsideration was effective, the appeals were "untimely because [they were] filed prior to the administrative law judge's Order on the Motions." *Id.* at A5.[4]

b. In March 1988, the Board considered petitioners' appeal and affirmed the ALJ's decision on the merits. App., *infra*, 3a-8a. The Board reaffirmed its earlier decision, concluding that "the claimants were injured within the scope and course of their employment pursuant to the 'trip payment exception' to the 'coming and going rule,' " and that "claimants were injured on a covered situs." App., *infra*, 5a. The Board also rejected petitioners' contention that they were "entitled, under the Constitution, to have an Article III court review the Board's Order prior to paying claimants the compensation awarded by

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as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

Section 921(b) provides for review of compensation orders before the Benefits Review Board. 33 U.S.C. 921(b).

[3] 20 C.F.R. 802.205A(a) (1987) provided:

A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal.

As the court of appeals pointed out, see Pet. App. B11 n.2, the pertinent regulations have since been amended in a manner not material to this case. (They have also been redesignated as 20 C.F.R. 802.206.)

[4] In December 1987, the Board denied a motion for reconsideration filed by the Director. App., *infra*, 1a-2a.

the administrative law judge." App., *infra*, 6a. As the Board stated:

> [A]lthough it is clear that adjudication of workers' compensation claims under the Act involves "private rights," it is equally clear that Article III of the Constitution does not require Article III judges to perform every stage of adjudication where "private rights" are at stake.

App., *infra*, 8a.

c. Petitioners then sought review of the Board's decision in the court of appeals.

4. In August 1989, the court of appeals dismissed the petition for review and vacated the Board's decision, holding that because the Board lacked jurisdiction to consider petitioners' appeal from the ALJ's decision, the court lacked jurisdiction to review. Pet. App. B1-B21. The court first concluded that any appeal of the ALJ's decision filed while a motion for reconsideration was pending was subject to dismissal under the regulations even if the motion was later withdrawn. *Id.* at B12-B16.[5] The court then noted that, under the governing regulation, 20 C.F.R. 802.205A(e) (1987), "[f]ollowing final action by the administrative law judge or deputy commissioner [dismissing or granting the motion for reconsideration], a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal." Pet. App. B16-B17 (brackets in original). Here, the court continued, petitioners "failed to file a new notice of appeal after the ALJ ruled on the

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[5] The court of appeals thus expressly disagreed with the Board's alternative ground for dismissing the claimants' appeal—that a perfected motion for reconsideration that is later withdrawn fails to toll the period for filing a notice of appeal. Pet. App. B14.

motion to withdraw the motion for reconsideration." *Id.* at B18. Since the court found no distinction in this context between a motion that has been withdrawn and a motion that has been disposed of on the merits, *id.* at B17, it held that the "Board deviated from [that] regulation[] when it found [petitioners'] notice of appeal timely," *id.* at B20-B21. Accordingly, the court vacated the Board's decision and dismissed the case. *Id.* at B21.

ARGUMENT

1. Petitioners contend (Pet. 14-23) that the court of appeals misconstrued the Board's regulations in holding that their failure to file a notice of appeal, after the ALJ had granted the claimants' request to withdraw their reconsideration motion, precluded review of the ALJ's compensation decision. Under those regulations, which implement the statutory 30-day deadline for review of compensation orders (see 33 U.S.C. 921(a)), "[a] timely motion for reconsideration of a decision or order of an administrative law judge * * * shall suspend the running of the time for filing a notice of appeal." 20 C.F.R. 802.205A(a) (1987). Those regulations further provide that "[i]f a timely motion for reconsideration * * * is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature." 20 C.F.R. 802.205A(e) (1987). And the regulations expressly state that "[f]ollowing final action by the administrative law judge * * * [on a timely motion for reconsideration], a new notice of appeal shall be filed * * * by any party who wishes to appeal." *Ibid.*

As the Board explained over a decade ago, that procedural scheme "provides that a timely motion to reconsider renders an appeal premature and subject to dismissal. * * * [The] appeal time will begin anew upon action by the administrative law judge on a request for reconsideration and the filing of a new notice of appeal." 43 Fed. Reg. 42,144 (1978). In other words, like a premature motion to alter or amend a judgment under Fed. R. Civ. P. 59, a previously filed notice of appeal to the Board, in these circumstances, "simply self destructs." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (internal quotation marks omitted).

Here, petitioners filed their Board-construed "notice of appeal" two days before the claimants filed their motion for reconsideration before the ALJ. Under the express terms of 20 C.F.R. 805.205A(e) (1987), this attempt to invoke the Board's jurisdiction must fail since the regulation provides that "[i]f a timely motion for reconsideration * * * is filed, *any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed as premature.*" 20 C.F.R. 802.205A(e) (1987) (emphasis added). In these circumstances, the regulation obligated the Board to dismiss the appeal—an oversight properly corrected by the court of appeals—where, as here, petitioners did not file a new notice of appeal "[f]ollowing final action by the administrative law judge." *Ibid.* See *Jones* v. *Illinois Cent. Gulf R.R.*, 846 F.2d 1099, 1102 (7th Cir. 1988); cf. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987).[6]

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[6] Petitioners contend that they were not required to file a new notice of appeal because the ALJ's final decision—grant-

2. Petitioners also contend (Pet. 14, 24-26) that the court of appeals erred in failing to defer to the Board's construction of its regulations. But that contention rests on a false premise since the court of appeals found that the Board did not even identify "the grounds on which the Board found [petitioners'] notice of appeal to be timely." Pet. App. B9-B10. In any event, the court "recognize[d] that the rules and regulations of the Board deserve special deference," *id.* at B18 (citing *Jones* v. *Illinois Cent. Gulf R.R.*, *supra*), but also correctly concluded that such deference would not be appropriate where the Board "deviate[d] from its own regulations," Pet. App. B18; cf. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). As explained above, the Board's implicit conclusion that petitioners had filed a timely notice of appeal cannot be squared with the plain terms of 20 C.F.R. 802.205A(e) (1987).[7] Accordingly, the court of appeals properly

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ing the claimants' request to withdraw the reconsideration motion—does not fall within the terms of 20 C.F.R. 802.205A (c) and (d) (1987). To be sure, those provisions speak of an ALJ's decision either to grant or deny a motion for reconsideration. But as the court of appeals correctly observed (Pet. App. B17-B18), a decision to grant a party's request to withdraw a reconsideration motion is the functional equivalent of the sort of final administrative action contemplated by Section 802.205A(c) and (d).

[7] Petitioners also attempt (Pet. 22) to analogize the Board's treatment of the claimants' withdrawal motion to a motion for voluntary dismissal under Fed. R. Civ. P. 41(a). But that analogy misses the mark. The question whether the running of a statute of limitations is suspended by the pendency of a civil complaint that has been voluntarily dismissed is in no way analogous to the question whether a notice of appeal can be filed during the pendency of a motion for reconsideration that is later withdrawn. Underscoring the difference,

refused to defer to the Board's unexplained exercise of jurisdiction over petitioners' challenge to the compensation award. See *Udall* v. *Tallman*, 380 U.S. 1, 4, 16-17 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Senior Appellate Attorney

ANNE PAYNE FUGETT
Attorney
Department of Labor

APRIL 1990

Rule 41(a) provides that, in certain circumstances, "an action may be dismissed by the plaintiff without order of court." Fed. R. Civ. P. 41(a). By contrast, a claimant's request to withdraw a reconsideration motion pending before an ALJ is not self-executing. To the contrary, since under the Board's regulations, the filing of a reconsideration motion effectively suspends the finality of the ALJ's decision, see 20 C.F.R. 802.205A(a) (1987), the ALJ is obliged to dispose of that motion in order for the review process to proceed.

APPENDIX A

BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

BRB Nos. 86-3048 and 86-3048A

Case No. 81-LHCA-2135

OWCP No. 7-71798

WALTER SAWYER, CLAIMANT-RESPONDENT,
CROSS-PETITIONER

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONERS,
CROSS-RESPONDENTS

BRB Nos. 86-3049 and 86-3049A

Case No. 81-LHCA-2136

OWCP No. 7-72799

GLYNN RHODES, CLAIMANT-RESPONDENT,
CROSS-PETITIONER

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONERS,
CROSS-RESPONDENTS

ORDER

[Filed Dec. 17, 1987]

The Director has filed a motion, requesting reconsideration of the Board's April 22, 1987 Order, which dismissed claimant's consolidated appeals, 86-3048A and 86-3049A, in the captioned case. Employer/Carrier have objected to the Director's motion. The Board notes employer/carrier's objections.

Upon careful consideration, the Board hereby denies the Director's motion for reconsideration.

In addition, employer/carrier have filed a supplemental brief in support of their appeals in BRB Nos. 86-3048 and 86-3049. 20 C.F.R. § 802.214. The Board accepts the supplemental brief as part of the record. Responses to the supplemental brief may be filed within twenty (20) days from receipt of this Order. 20 C.F.R. § 802.214.

Finally, the Board acknowledges receipt of claimant's response brief. 20 C.F.R. § 802.211.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals Judge

Dated this 17th day of December 1987

APPENDIX B

BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

BRB No. 86-3048

WALTER SAWYER, CLAIMANT-RESPONDENT

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONER

BRB No. 86-3049

GLYNN RHODES, CLAIMANT-RESPONDENT

v.

TIDELAND WELDING SERVICE AND
LIBERTY MUTUAL INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONER

DECISION AND ORDER

[Filed Mar. 31, 1988]

APPEALS OF THE DECISIONS AND ORDERS ON REMAND-AWARDS OF BENEFITS OF BEN H. WALLEY, ADMINISTRATIVE LAW JUDGE, UNITED STATES DEPARTMENT OF LABOR

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and TAIT, Administrative Appeals Judge.*

PER CURIAM:

Employer appeals the Decisions and Orders on Remand (81-LHCA-2135, 2136) of Administrative Law Judge Ben H. Walley awarding benefits pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended 33 U.S.C. § 901 *et seq.* (the Act). Prior to the initial hearing in this case, the claims were consolidated, as both claims arose from the same incident and involved substantially the same issues. We must affirm the findings of fact and conclusions of law of the administrative law judge which are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman, & Grylls Associate, Inc.*, 380 U.S. 359 (1965).

On June 21, 1980, claimants sustained injuries in an automobile accident while working for employer as welders. Employer runs a ship and maritime repair fabricating facility located south of highway 90 on both the east and west banks of Bayou Boeuf, Louisiana. Claimants sustained their injuries on the eastern end of the Route 90 Bayou Boeuf overpass, approximately one and one quarter miles from employer's west bank facility and 220 feet from Route 622, the

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (West 1986).

entrance road to employer's east bank facility. Claimants were on their way home from the west bank facility at the time of their accident.

In his first Decision and Order, the administrative law judge concluded that claimants were not entitled to benefits as they were not injured within the scope of their employment, *see Foster v. Massey*, 407 F.2d 343 (D.C. Cir. 1968), and were not injured on a covered situs. *See* 33 U.S.C. § 903(a). Claimants appealed the findings of the administrative law judge to the Board. In its Decision and Order, the Board reversed the administrative law judge's Decision and Order and found that since claimants received $25 per week from employer specifically for travel expenses, the claimants were injured within the scope and course of their employment pursuant to the "trip payment exception" to the "coming and going rule." *See Sawyer v. Tideland Welding Service*, 16 BRBS 344, 346 (1984). The Board further found that claimants were injured on a covered situs, and the case was remanded to the administrative law judge for consideration of the remaining issues. *Id.*

On remand, the administrative law judge found that claimant Sawyer was entitled to temporary total disability benefits and claimant Rhodes was entitled to temporary total and permanent partial disability benefits as a result of the injuries they sustained in the accident. The administrative law judge awarded both claimants continuing compensation for their respective disabilities, as well as a substantial amount of back benefits totalling approximately $100,000 for Sawyer and approximately $30,000 for Rhodes. On December 3, 1986, employer filed a motion to stay the payments and a notice of appeal of the administrative law judge's decisions with both the Benefits Review Board and the United States Court of Appeals for the

Fifth Circuit. The motion for a stay of payments was subsequently denied by Board Order dated December 8, 1986, for failure to establish irreparable injury. *See* 33 U.S.C. § 921(b). The Fifth Circuit which initially granted a stay, subsequently dissolved it for lack of jurisdiction as an appeal was pending before the Board.[1] *See Tideland Welding Service v. Director, OWCP*, 817 F.2d 1211, 20 BRBS 9 (CRT) (5th Cir. 1987).

On appeal, employer contends that claimants were not injured in the scope or course of their employment and that they were not injured on a covered situs. Employer further contends that it is entitled, under the Constitution, to have an Article III court review the Board's Order prior to paying claimants the compensation awarded by the administrative law judge. In support of this contention, employer argues that Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), requires it to turn over property prior to a review by an Article III court in violation of the due process and equal protection clauses of the Constitution. Finally, employer contends that requiring it to pay a lump sum amount to claimants without a bond or other guarantee of its return if employer is successful on appeal, constitutes irreparable harm to employer. Claimants respond that the administrative law judge's Decision and Order should be affirmed.[2]

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[1] Claimants filed a consolidated cross-appeal (BRB Nos. 86-3048A and 86-3049A) with the Board which was dismissed as untimely by Order dated April 22, 1987.

[2] We decline to address claimants' contentions raised in their response brief that the administrative law judge's erred in denying penalties pursuant to Sections 14(e) and (f), 33 U.S.C. § 914(e), (f), as they were not raised in a timely cross-appeal. *See Del Vacchio v. Sun Shipbuilding & Dry*

When a case is before the Board for a second time, and the same issues are raised in the second appeal, the Board generally holds that its prior decision is the "law of the case," and refuses to re-examine the issue. *See Dixon v. John J. McMullen and Associates Inc.*, 19 BRBS 243 (1987). In the instant case, the Board in its first decision found that claimants were injured in the course of their employment and on a covered situs. These findings constitute the law of the case, and we therefore decline to address employer's contentions concerning these issues which were resolved in the Board's first Decision and Order.

Regarding employer's contention that it has suffered a violation of its constitutional rights, in Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), Congress authorized the Benefits Review Board to hear and determine appeals that raise substantial questions of law and fact from decisions on claims by employees covered under the Act and its extensions. The Board was created to perform the functions formerly performed by the United States District Courts, *see Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73 (3d Cir. 1976), and the United States Courts of Appeal are the only judicial bodies granted direct review authority over final Board decisions. *See* 33 U.S.C. § 921(b)(3), (c). The Board has held that hearing before an administrative law judge provides employer with a full hearing in satisfaction of its right to due process of law, and concluded that requiring an employer to pay benefits while an appeal is pending does not constitute irreparable harm and does not deprive employer of due process. *Smith v.*

Dock Co., 16 BRBS 190 (1984). For the same reason we will not address claimant Rhodes' contention that his average weekly wage was incorrectly calculated.

Aerojet Shipyards, 16 BRBS 49 (1983). Moreover, although it is clear that adjudication of workers' compensation claims under the Act involves "private rights," it is equally clear that Article III of the Constitution does not require Article II judges to perform every stage of adjudication where "private rights" are at stake. *Kalaris v. Donovan*, 697 F.2d 376, 386 (D.C. Cir.), *cert. denied*, 462 U.S. 1119, *reh'g denied*, 463 U.S. 1263 (1983). Employer's contentions are therefore without merit, and are rejected.

Lastly, we decline at this stage to reevaluate case precedent holding that the alleged financial irresponsibility of the benefits recipients alone is sufficient to constitute irreparable harm. *See Associated Indemnity Corp. v. Shea*, 325 F. Supp. 1100 (S.D. Ala. 1971), *aff'd on other grounds*, 455 F.2d 913 (5th Cir. 1972); *Holland America Insurance Co. v. Rogers*, 308 F. Supp. 1031 (N.D. Cal. 1970).

Accordingly, the administrative law judge's Decisions and Orders on Remand-Awards of Benefits are affirmed.

SO ORDERED.

/s/ Robert L. Ramsey

ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Reid C. Tait

REID C. TAIT
Administrative Appeals Judge

Dated this 31st day of March 1988

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